No. 92-479

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner,
v.
ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* AMERICAN PETROLEUM INSTITUTE AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER

American Petroleum Institute ("API") and National Association of Manufacturers of the United States of America ("NAM") move this Court for leave to file a brief *amici curiae* in support of the petition for a writ of certiorari pursuant to Rule 37.2 of the Supreme Court Rules. Petitioner has consented to the filing of this brief *amici curiae*, but Respondents have declined to consent.

API and NAM are seeking leave to file their brief *amici curiae* because they have developed significant empirical information on punitive damages awards in West Virginia, as well as in several other states. This information, which demonstrates the national importance of this case, may be unavailable to the Court in its consideration of the petition for certiorari unless API and NAM are granted leave to file their *amici curiae* brief.

Moreover, in their *amici curiae* brief, API and NAM discuss two important, recent federal circuit court decisions applying this Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991): *Johnson v. Hugo's Skateway*, 1992 U.S. App. LEXIS 21065 (4th Cir. Sept. 8, 1992) (*en banc*), and *Dunn v. HOVIC*, 1992 U.S. App. LEXIS 22749 (3d Cir. Sept. 18, 1992).

For these reasons, API and NAM request the Court to grant their motion for leave to file a brief *amici curiae*.

STATEMENT OF INTEREST

The *amici curiae* filing this brief have a significant interest in the outcome of this case. Recent years have seen dramatic and substantial growth in the amount of punitive damages awarded by juries in federal and state courts, including those in West Virginia. This growth requires careful scrutiny by the trial and appellate courts to check irrational awards. The West Virginia Supreme Court of Appeals has announced an unconstitutional and unworkable test to apply not only to the excessive award in this case, but also in all future punitive damages cases in West Virginia.

The American Petroleum Institute ("API") represents the interests of approximately 300 member companies involved in all aspects of the oil and natural gas industry, including exploration, production, transportation, refining and marketing of petroleum products. As members of the domestic business community, API and its member companies are greatly concerned by the increase in untoward and excessive awards of punitive damages.

The National Association of Manufacturers of the United States of America ("NAM") is a non-profit voluntary business association representing more than 12,000 companies throughout the United States. NAM is affiliated with an additional 128,000 businesses through the National Industrial Council and the NAM Associations Council. NAM and its members are vitally interested in the unwarranted growth of punitive damages and the impact that this issue has on the economic viability of business in our highly competitive economy.

Because trial and appellate court review play a crucial role in controlling the amount of punitive damages awarded against Defendants, API and NAM urge the Court to grant the motion for leave to file a brief *amici curiae*

Respectfully submitted,

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BRIEF OF *AMICI CURIAE* AMERICAN PETROLEUM INSTITUTE AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

The statement of interest is included in the Motion for Leave to File Brief *Amici Curiae* in Support of Petitioner.

STATEMENT OF THE CASE AND FACTS

Amici adopt the statement of the case and facts as set forth by Petitioner.

SUMMARY OF ARGUMENT

1. This case warrants review by this Court because new empirical evidence shows that the amount of punitive damages awarded in final judgments in West Virginia,

and in other states, has grown dramatically over the past two decades. Between 1968 and 1985, the West Virginia appellate court affirmed only *one* judgment for punitive damages against a business enterprise. In the seven years since 1985, however, that court has affirmed *ten* awards for punitive damages against business enterprises. Furthermore, the amount of punitive damages reflected in these final judgments has increased steadily since 1985, and the $10 million award here pushes the curve even higher.

The West Virginia experience is basically consistent with the empirical evidence from California, New York, Illinois, and Texas, four states that contain about 31% of the population. Over the past two decades, final judgments awarding punitive damages under the laws of those four states against business enterprises increased an astonishing *117 times* in constant dollars.

Amici submit that this trend cannot simply be the natural development of a hoary legal idea rooted in the common law that is largely outside the ambit of the Due Process Clause. This case warrants review so that this Court may give further consideration to the principles announced in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991).

2. The importance of thorough review of awards of punitive damages is underscored by the fact that juries are given virtually unlimited discretion in arriving at the amount of punitive damages sufficient to punish and deter a Defendant's conduct. This discretion has manifested in the remarkable growth rate of punitive damages awards in the last two decades. The careful review of awards approved in *Haslip* can effectively curtail excessive awards and unlimited jury discretion, as demonstrated by two recent decisions announced by the Third and Fourth Circuits. Because Defendants in West Virginia—and Defendants in the other states that have not heeded *Haslip*—are not receiving the review of punitive damages awards required by due process, this Court should provide additional guidance regarding the principles announced in *Haslip*.

ARGUMENT

I. THIS CASE HAS NATIONAL IMPORTANCE BECAUSE IT REFLECTS THE DRAMATIC GROWTH IN THE AMOUNT OF PUNITIVE DAMAGES AWARDED BY THE COURTS

The award of punitive damages in this case—an award more than 500 times the amount of the compensatory damages—is part of a trend of unconstrained growth in the amount of money paid to plaintiffs and their lawyers in the form of punitive damages during the last two decades.

A recent empirical study of punitive damages awards in California, Illinois, New York and Texas (states which contain 31% of the U.S. population) demonstrates the extent of the growth of punitive damages awards. Stephen M. Turner, *et al.*, *Punitive Damages Explosion: Fact or Fiction?* 2 (Washington Legal Foundation, Working Paper Series No. 50, Nov. 1992) (forthcoming).[1] The study compared awards in business-related cases in the four states in two time periods: awards from 1968 through 1971 were measured against awards during the years 1988 through 1991. The methodology behind the figures from this study is important because it was objective and extremely conservative. The figures represent only reported appellate decisions that affirmed judgments for punitive damages, *see, id.* at A1-A3, for two important reasons: First, these reported decisions are

[1] This study was undertaken by the General Counsel's Office of Texaco Inc. Counsel of record for API and NAM participated in this study and uses the results here with the permission of Texaco Inc.

The study analyzed cases from the four most recent years and, for purposes of comparison, looked to cases from the four year period twenty years earlier, 1968-71.

completely objective. No reliance was made on jury verdict reporters or on any anecdotal evidence. Each data point is supported by a reported case citation. Second, because the reported decisions all affirmed judgments for punitive damages, the figures represent the baseline amount that was actually paid by Defendants in the form of punitive damages. (Of course, reported cases affirming punitive damages awards without stating the amount of the award were not included.)

The study results showed that punitive damages from the period 1968-71 totalled only $800,000, but for the later period the total was $312 million. *Id.* at 2-4. This surge in dollars awarded as punitive damages represents an increase of more than 117 times, after correcting for inflation. In comparison, the U.S. Gross National Product has less than doubled in the same two decades. U.S. Bureau of the Census, *Statistical Abstract of the United States*, 1991, 431 (111th ed. 1991). Because the study included only awards reported in appellate court decisions, the amount actually paid as punitive damages from 1988 through 1991 in fact is much greater than $312 million. *See* Stephen M. Turner, *et al.*, *Punitive Damages Explosion: Fact or Fiction?* 3 (Washington Legal Foundation, Working Paper Series No. 50, Nov. 1992) (forthcoming) (study does not include cases where jury verdicts awarding punitive damages were settled before a final decision on appeal).

The rapidly increasing amount of money awarded as punitive damages in the last twenty years has far surpassed the increase in the number of cases filed. The number of cases resulting in awards of punitive damages from 1988 through 1991 is only five times greater than the number from 1968 through 1971. *Id.* at 2-4. Thus, while some of the growth in punitive damages has come in the number of cases, much more of the growth has come in the amounts juries have awarded—and appellate courts affirmed—as punitive damages.

A comparison of the growth in the amount awarded as compensatory damages to that for punitive damages also emphasizes the extent of the punitive damages explosion. While the dollar amount of compensatory damages increased 51 times in the twenty-year period, the amount awarded as punitive damages has increased 117 times. Texaco Inc., "An Empirical Study of Final Judgments Awarding Punitive Damages" (presented Oct. 15, 1992).[2]

At least one observer has suggested that the increase in the size of corporate assets has brought about the growth in punitive damages awards. *See* Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. Pa. L. Rev. 1147, 1256-57 n.403 (1992). To the contrary, however, the assets of the largest U.S. corporations have increased only about 5.6 times in nominal dollars over the last two decades, and measured in constant dollars the increase in assets has been a mere 1.7 times. *The Fortune Directory of the 500 Largest U.S. Industrial Corporations*, Fortune, May 1971, at 172, 188; *The Fortune Directory of the 500 Largest U.S. Industrial Corporations*, Fortune, Apr. 22, 1991, at 286, 305. If increasing corporate net worth is the explanation for the growth in punitive damages awards, it is inconsistent with this Court's approval of Alabama law which precludes introduction of evidence of defendant's net worth at trial. *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1045 ("[T]he fact finder must be guided by more than the defendant's net worth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket."). The preclusion of evidence of defendant's financial condition is consistent with principles of punishment in criminal cases; defend-

[2] Copies of this unpublished presentation will be served on counsel for Petitioner and Respondents and lodged with the Clerk of the Court.

ant's wealth or status generally does not factor into the assessment of a criminal fine or calculation of a criminal sentence.

West Virginia differs from the four states analyzed by the study only in that punitive damages awards do not enjoy a long history in that state: the years 1968 through 1984 saw virtually no awards of punitive damages in cases tried in state and federal courts in West Virginia. It is only in recent years—since 1985—that West Virginia Plaintiffs have received punitive damages.

Despite the recent advent of punitive damages awards in West Virginia, that state has followed the other states in the explosive growth in the amount of money awarded as punitive damages. In 1985—the first year of the punitive damages trend in West Virginia—the total dollar amount of punitive damages awarded was almost one hundred times greater than the one award in 1973 (the only year between 1968 and 1984 reflecting a punitive damages final judgment in West Virginia). The average award in 1985 was nearly fifty times greater than the award in 1973, after correcting for inflation. This growth has not abated; the total amount awarded steadily has increased from 1985 until 1991.

Like the other states, the growth in the amount of money awarded as punitive damages in West Virginia cannot be explained by the increase in the number of cases. The number of cases resulting in punitive damages final judgments from 1985 through 1991 represent an increase of ten times the number from 1970 through 1980. The increase in the amount of money paid by Defendants in West Virginia therefore is not the result of equal growth in the number of cases.

The long-term trend in West Virginia and around the country shows a dramatic increase in the resources drained from American business through awards of punitive damages. The total cost to American business of

defending against, and paying for, punitive damages amounts to a "windfall" for the plaintiff, *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981), and directs business dollars away from investment in jobs and equipment. *Cf.* Note, *An Economic Analysis of the Plaintiff's Windfall From Punitive Damage Litigation*, 105 Harv. L. Rev. 1900, 1909 (1992) ("[T]he lure of the plaintiff's windfall . . . leads to increased accident costs, an artificially high rate of litigation, and a reduction of society's production possibility frontier."). Careful review by trial and appellate courts provides the only real constraint on the ever-increasing size (and number) of awards, yet Defendants are receiving widely disparate post-trial review of awards of punitive damages, depending solely on the accident of geography. This Court should provide additional guidance to remedy this disparate treatment.

II. THE WEST VIRGINIA DECISION BELOW, READ AGAINST THE BACKDROP OF *HUGO'S SKATEWAY* AND *DUNN*, SHOWS THE IMPORTANCE OF FURTHER CONSIDERATION BY THIS COURT OF THE *HASLIP* PRINCIPLES

This Court's decision in *Haslip* approved the traditional measure of liability for an award of punitive damages in a case of fraud, *see Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032, 1043-44 (1991) (common-law method for assessing punitive damages does not violate due process but "general concerns of reasonableness and adequate guidance from the court . . . properly enter into the constitutional calculus"), and directed attention to constraints placed on the discretion of the fact finder through post-trial review procedures in Alabama. Because both the trial and appellate courts in Alabama carefully measure any award for excessiveness by application of "detailed substantive standards" that have "real effect" on jury awards in Alabama, this Court affirmed the *Haslip* award. *Id.* at 1045. The Court determined that this review ensures that awards of punitive damages are not "greater than reasonably necessary

to punish and deter," and therefore comport with due process. *Id.* at 1045-46.

The need for this focus on jury discretion is evident in the idiopathic growth of punitive damages in the last two decades. Typical jury instructions do not provide any real guidance for the fact finder in calculating an amount of punitive damages; the jury is given virtually complete discretion. For example, the instructions approved in *Haslip* directed the jury to consider the harm caused and the sum necessary to punish and deter similar conduct in fixing the amount of punitive damages. *Id.* at 1037 n.1. In contrast, instructions in West Virginia (and other jurisdictions) regarding compensatory damages direct the jury to carefully weigh evidence of loss, to consider whether the loss could have been mitigated, and to determine whether plaintiff was contributorily negligent. *See, e.g., Raines v. Thomas*, 330 S.E.2d 334, 336 (W. Va. 1985) (in personal injury and property damage case jury instructed to "assess a percentage of fault" attributable to plaintiffs and defendant for damages calculations); *Middle-West Concrete v. General Ins. Co.*, 267 S.E.2d 742, 747 (W. Va. 1980) (jury properly instructed to consider whether plaintiff used "reasonable efforts . . . to lessen the damages" in action against surety); *State Road Comm'n v. Bowling*, 166 S.E.2d 119, 123 (W. Va. 1969) (compensatory damage instruction in eminent domain case appropriately directed the jury to ascertain fair market value of land and improvements, defined as price property will bring if offered for sale, based on evidence presented at trial). *See also* W. Va. Code § 55-7-5(2) (Michie 1992) (jury in wrongful death case must set forth separately in verdict form amount of damages awarded to compensate for funeral, hospital, medical and other related expenses).

The courts that have followed the guidance provided in *Haslip* have demonstrated the effectiveness of careful post-trial review in controlling excessive punitive damages

awards. For example, in *Dunn v. HOVIC*, 1992 U.S. App. LEXIS 22749 (3d Cir. Sept. 18, 1992), the court determined that a review of an award of punitive damages by the trial court that included application of five factors pursuant to the law of the Virgin Islands provided adequate constraint on the discretion of the jury. The trial court's review resulted in reduction of a $25 million award of punitive damages in an asbestos personal injury case to $2 million. The Third Circuit cautioned district courts to "explicitly assess" the amount of any award of punitive damages in light of the specific review factors in all future cases. *Id.* *53 n.22.

In addition to the review conducted by the *Dunn* trial court, the Third Circuit also reviewed the award for excessiveness, resulting in further reduction of the award by half. The court considered the nature of plaintiff's injury as well as the multiple claims for punitive damages in the asbestos personal injury litigation, and concluded that $1 million represented the "maximum amount of punitive damages that could reasonably have been awarded." *Id.* at *76.

The Fourth Circuit also recently considered a challenge to an award of punitive damages, and, like the Third Circuit, concluded that the rigorous review conducted in Alabama and approved in *Haslip* was required for a constitutional award process. In *Johnson v. Hugo's Skateway*, 1992 U.S. App. LEXIS 21065 (4th Cir. Sept. 8, 1992) (*en banc*), the Fourth Circuit vacated and remanded an award of $175,000.00 in punitive damages as inconsistent with the standards announced in *Haslip*. The court determined that the "limited scope of review" afforded in federal court pursuant to Fed. R. Civ. P. 59 denied defendant due process. The court concluded that due process requires federal courts in diversity actions to compensate for this limited review by including in instructions to the jury substantive factors like those applied on review of an award of punitive damages by Alabama

courts and approved in *Haslip*. *Id.*; *accord Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991).

This Court's decision in *Haslip* has focused attention on the need to moderate jury discretion in the amount of money awarded as punitive damages, and the decisions in *Dunn* and *Hugo's Skateway* demonstrate that careful post-trial consideration of the awards is an effective means for controlling that discretion. Decisions like that announced by the West Virginia Supreme Court of Appeals in this case will, absent further guidance from this Court, perpetuate the dramatic growth rate of punitive damages. Additional guidance from this Court is necessary to ensure that unbridled jury discretion resulting in excessive awards of punitive damages is controlled.

CONCLUSION

For the reasons stated above and in the Petition filed by TXO Production Corporation, the writ of certiorari should be granted and the decision of the West Virginia Supreme Court of Appeals reversed.

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